

FEDERAL COURT.

S. Sivasubramanian for the appellants.

Respondents in person.

Ong Hock Sim F.J. (delivering the judgment of the Court): We have carefully perused the Record of Appeal. With respect we are of the view that the appeal should be allowed. Our reasons for doing so, we now set out.

The only question, in our view, is one of construction of Clause 2 of the agreement of November 9, 1961 between the respondents as vendors and appellant as purchaser. By that agreement, the vendors purported to convey that portion of 5 acres of the said land *as per sketch plan coloured red attached hereto* (emphasis ours). When asked counsel for the appellant said he was not aware of and could not produce the said sketch plan. There appears no dispute that some land of 5 acres had been occupied and developed by the appellant, at least since 1970, when the Grant or Title was issued. The respondents did not deny that they had entered into the said agreement for sale of the 5 acres. The disagreement apparently was over the contribution or payment by the appellant of the cost of sub-division and transfer. We would quote the judgment which says:—

"Another evident fact was that in the agreement the cost of sub-division was to be borne fully by the plaintiff but in the Statement of Claim it was stated that the defendant was to partition the land at their own cost and expense."

We differ, with respect again with the learned judge as to Clause (2) of the Agreement. In our view, the respondents undertook:—

"*at their own expense to take all necessary steps immediately to extract a proper title of the said land from the Government of Pahang and immediately thereafter upon issue of such title by the Government of Pahang to apply for a sub-division of the said land and a separate title of the aforesaid portion of 5 acres of the said land obtained and legally transferred to the Purchaser;*"

We have, italicized those portions to emphasise the vendors' obligations, and we note the semi-colon at the end thereof. That semi-colon, in our opinion, made clear that "necessary fees and other expenses *in connection with the transfer* of the aforesaid portion of the said land shall be borne by the purchaser." Again we have underlined what we consider the material words for consideration and we conclude that the learned judge was in error when he said:—

"Indeed, in their letter to the defendant(s) the plaintiff's counsel reminded the defendant(s) that they must comply with clause (2) of the agreement (P1) which required them to subdivide at their own cost' (We think quite rightly) but 'Clearly, if there had been no compliance, therefore, it was the plaintiff and not the defendant(s) (sic) because the duty to pay the cost of the said sub-division was entirely the plaintiff's not the defendant(s) (sic)' (We think the learned judge was here in error)."

The difficult question on a close scrutiny of the case is really what we can do for the parties. It is not denied by respondents that they had entered into an agreement (P1) for the sale of the 5 acres. They say, however, that the terms were not as agreed. We cannot go behind the terms of P1 and no evidence was adduced of any variation of the terms. In the absence of the sketch plan, also that the five acres were not demarcated (there being no sketch plan, as

A admitted by appellant's counsel) we are of the view that the agreement should be treated as void for uncertainty, that specific performance cannot be decreed while the area is unspecified and alienation or sub-division will have to be decided by the Government of Pahang, and in all the circumstances of the case, the *status quo* be restored. We therefore set aside the order of the court at Kuantan and order instead:—

- (1) That the respondents do repay the sum of \$3,000 paid by the appellant under the agreement of November 9, 1961;
- (2) That upon repayment of the said sum, the appellant do vacate and give up possession of the said 5 acres of land now occupied by her;
- (3) That the costs of this appeal be borne by the parties themselves;
- (4) That the deposit in connection with the appeal be refunded to the appellant; and
- (5) That the costs of the appellant in the High Court be taxed in accordance with the scale laid down for an appeal from the Sessions Court and paid by the respondents.

Order accordingly.

Solicitors: *S. Sivasubramanian.*

**LEHA BINTE JUSOH v.
AWANG JOHARI BIN HASHIM**

[F.C. (Ong Hock Sim, Raja Azlan Shah and
Chang Min Tat F.JJ.) December 8, 1977]

[Penang — Federal Court Civil Appeal No. 77 of 1976]

F *Contract — Agreement of sale of land — Person agreeing to purchase, a minor — Contract void — Whether vendor holds land in trust for purchaser — Return of purchase price — Contracts Act, 1950, ss. 10, 11 and 66.*

G The respondent had alleged that he had entered into an agreement for the purchase of certain lands belonging to an estate of which the appellant was the administratrix. At the time of the alleged agreement the respondent was a minor. The learned trial judge held that the agreement was void but he went on to hold that the purchase price having been paid in full and the respondent let into possession, a constructive trust had been created and the deceased held the lands in trust for the respondent. The appellant appealed.

H **Held**, allowing the appeal: (1) to import a constructive trust in this case and grant a declaration that the appellant as administratrix held the lands as trustee for the respondent and that the respondent was entitled to possession of the lands was in effect to enforce an agreement which was void *ab initio*;

(2) an order should be made for the purchase price to be repaid on the respondent vacating the lands.

Cases referred to:—

- (1) *Mohori Bibee v. Dhumodas, Ghose* 30 I.A. 114.
- (2) *Suraj Narain Dube v. Sukhu Aheer & Anor.* A.I.R. 1928 All. 440.

I **FEDERAL COURT.**

A. Jayadeva for the appellant.

Lee Kok Liang for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This is an appeal from the decision of Syed Agil Barakbah J. made on June 1, 1976 at the High Court, Alor Star, allowing, with costs, a claim

by the respondent (a) that the appellant as Administratrix of the Estate of Mat bin Jusoh (deceased) hold deceased's share in certain lands as trustee thereof for and on behalf of the respondent and (b) that the respondent is entitled to possession of those portions occupied by him since March 1, 1952 pursuant to an agreement of sale between the respondent as purchaser and the deceased as vendor.

An agreement of sale is set out at pages 51-52 of the Record. The appellant, while disclaiming knowledge of it, contends that as it is admitted that the respondent at the date of the agreement, was incompetent to contract, having been born on March 31, 1937, it is null and void, and no specific performance based thereon can be decreed. The Privy Council in *Mohori Bibee v. Dhumodas Ghose*⁽¹⁾ ruled that "the (Indian Contracts) Act makes it essential that all contracting parties should be competent to contract" and specifically enacts that a person incompetent to contract by reason of infancy cannot make a contract within the meaning of the Act. Our Contracts Act, 1950 is *in pari materia* with the Indian Contracts Act (see sections 10 and 11). The learned judge accordingly held, following *Suraj Narain Dube v. Sukhu Aheer & Anor.*⁽²⁾ the agreement of March 1, 1952 to be void and no specific performance can be ordered on the agreement as an agreement for sale.

However, he went on to hold that the purchase price having been paid in full and the respondent let into possession, a constructive trust had been created and the deceased held the lands in trust for the respondent. With respect, to import a constructive trust in the present instance and grant a declaration that the appellant as Administratrix of Mat bin Jusoh, deceased, held deceased's share as Trustee thereof for and on behalf of respondent and that respondent is entitled to possession of the portions occupied pursuant to the agreement and order such trust to be specifically performed is in effect to enforce an agreement which is void *ab initio*.

We, therefore, allowed the appeal and set aside the order of the learned judge. We ordered the appellant to repay the \$5000/- purchase price on the respondent's vacating the lands occupied by him, pursuant to section 66 of the Contracts Act. The deposit to be refunded to the appellant. We made no order as to costs.

Appeal allowed.

Solicitors: Oo Gin Sun, Bakar & Co.; Lee Kok Liang.

A DIRECTOR-GENERAL OF INLAND REVENUE v. LAHAD DATU TIMBER SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977)]

[Kota Kinabalu — Federal Court Civil Appeal No. 106 of 1976]

Revenue Law — Income tax — Profits from extraction of timber — Agency fee — Timber profits tax — Finding of fact by Special Commissioners — Deductions for development cost, planting payments and commission — Income Tax Act, 1967, ss. 33(1) and 39(1)(g) — Supplementary Income Tax Act, 1967, s. 20.

Timber — Extraction — Agency fee — Timber profits tax.

In this case the facts were that a parcel of state land of approximately 4,364 acres was alienated to a co-operative society for agricultural development. The society was also given a timber licence with rights to extract, remove and sell the timber. The society entered into an agreement with the respondents whereby the respondents undertook to fell and cut the timber and to sell and export it. The respondents in turn entered into an agreement with Yong Brothers under which they were to fell the timber and remove and sell them. The proceeds of sale were to be collected by Yong Brothers. After they had deducted the extraction charges of 82 cts. per cubic foot and the commission on sale of 2% they would pay the balance to the respondent.

In the accounts for the year ending 31st December 1968 (year of assessment 1969) the respondents showed the receipt of "agency fee" as follows:—

Proceeds from sale of timber	\$1,789,645.59
Less	
Royalty	\$300,380.69
Fixed Commission paid to society	140,175.54
Extraction fee at \$1.00 per cubic foot	686,775.70
Planting payments	201,000.00
Development cost	158,000.00
	1,486,331.93
	<u>\$ 303,313.66</u>

The two issues before the Special Commissioners were (1) whether the sum of \$303,313.66 described as "agency fee" was liable to timber profits tax and (2) whether the three sums described as development cost, planting payments and commission were allowable deductions in ascertaining the adjusted income of the respondent. They held that the sum of \$303,313.66 described as "agency fee" was liable to timber profits tax under section 20 of the Supplementary Income Tax Act, 1967. They found that the respondent company did not carry out an agency business but what happened was that the rights under the licence were assigned by the society to the respondents. The Special Commissioners also found that the three sums claimed as deductions were not expenses wholly and exclusively incurred in the production of the gross income of the respondent. They said the three sums were paid for the use of the licence or permit to extract timber within the meaning of section 39(1)(g) of the Income Tax Act, 1967.

On appeal the learned trial judge held that the inference drawn by the Special Commissioners in the assignment of rights under the licence was not supported by the evidence and that therefore the "agency fee" was not assessable as a timber profits tax. He also held that the two sums described as "development cost" and "planting payments" were outgoings and expenses wholly and exclusively incurred in the production of the gross income of the respondent company and therefore deductible. On appeals to the Federal Court,

Held: (1) the learned trial judge was wrong to interfere with the decision of the Special Commissioners on the facts as there was sufficient evidence to support their conclusion;

(2) on the evidence it could not be said that the Special Commissioners had come to a wrong decision in law;

(3) the appeal must therefore be allowed and the decision of the Special Commissioners confirmed.